

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

|                        |   |                                |
|------------------------|---|--------------------------------|
| DEBBIE EMOND,          | ) |                                |
|                        | ) | No. CV-05-0300-CI              |
| Plaintiff,             | ) |                                |
|                        | ) | ORDER GRANTING IN PART         |
| v.                     | ) | PLAINTIFF'S MOTION FOR SUMMARY |
|                        | ) | JUDGMENT AND REMANDING FOR     |
| JO ANNE B. BARNHART,   | ) | ADDITIONAL PROCEEDINGS         |
| Commissioner of Social | ) | PURSUANT TO SENTENCE FOUR OF   |
| Security,              | ) | 42 U.S.C. § 405(g)             |
|                        | ) |                                |
| Defendant.             | ) |                                |
|                        | ) |                                |

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 16, 19) submitted for disposition without oral argument on June 5, 2006. Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Carol A. Hoch represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and remands to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Plaintiff was 48-years-old at the time of the administrative hearing, a high-school graduate with past work as a food handler, secretary and telephone solicitor. She protectively filed an

1 application for Supplemental Security Income (SSI) benefits on  
2 October 20, 2000, alleging disability due to back and foot problems.<sup>1</sup>  
3 (Tr. 118.) Following a denial of benefits at the initial stage and  
4 on reconsideration, a hearing was held before Administrative Law  
5 Judge (ALJ) Donald P. Krainess in Seattle, Washington. (Tr. 101,  
6 536.) At the hearing, Plaintiff testified she also suffered from  
7 stomach problems (Barrett's syndrome) for which she took medication,

---

8  
9 <sup>1</sup> Plaintiff filed a prior application for benefits on March  
10 30, 1999. (Tr. 61, 372.) The ALJ in the prior proceedings denied  
11 benefits on September 5, 2000 (Tr. 61-68), and Plaintiff re-filed in  
12 October 2000. The September 5, 2000, determination was not appealed  
13 and is, thus, final and binding. ALJ Krainess declined to reopen  
14 Plaintiff's prior application. (Tr. 51.) The first ALJ's findings  
15 are entitled to some *res judicata* consideration in these  
16 proceedings. *Chavez v. Bowen*, 844 F.2d 691, 694 (9th Cir. 1988).  
17 This is predicated on the "[p]rinciples of finality and fundamental  
18 fairness drawn from [42 U.S.C. ] § 405(h)," *Lively v. Secretary of*  
19 *Health and Human Services*, 820 F.2d 1391, 1392 (4th Cir. 1987),  
20 which states that the "findings and decision of the Commissioner of  
21 Social Security after a hearing shall be binding upon all  
22 individuals who were parties to such hearing." 42 U.S.C. § 405(h).  
23 *Res judicata* and the related concept of collateral estoppel also  
24 prevent the claimant from re-litigating issues which were decided in  
25 the prior claim. To overcome a presumption of continuing non-  
26 disability arising from the first ALJ's findings, the claimant must  
27 prove "changed circumstances" indicating a greater disability or new  
28 disabling impairments. *Chavez*, 844 F.2d at 693.

1 emphysema, anemia, some depression and fatigue. (Tr. 545-47.) On  
2 July 10, 2002, the ALJ denied benefits; review was denied by the  
3 Appeals Council on August 22, 2005, after reviewing post-hearing  
4 evidence submitted by Plaintiff's new representative. (Tr. 27.) This  
5 appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C.  
6 § 405(g).

#### 7 ADMINISTRATIVE DECISION

8 The ALJ concluded Plaintiff had not engaged in substantial  
9 gainful activity and suffered from the severe impairments of  
10 bilateral plantar fasciitis, mild to moderate degenerative disc  
11 disease and Barrett's esophagitis, but those impairments did not  
12 meet the Listings.<sup>2</sup> (Tr. 52, 56.) The ALJ found Plaintiff's  
13 depression was not a "severe" impairment. (Tr. 52.) Plaintiff's  
14 testimony was found not fully credible. The ALJ found Plaintiff had  
15 a residual functional capacity to perform a significant range of  
16 sedentary work with postural limitations, but was unable to perform  
17 her past relevant work. (Tr. 56.) Considering testimony from  
18 vocational expert Dr. Batchelder-Stewart, the ALJ found Plaintiff  
19 was able to perform a significant number of jobs in the national  
20 economy and, thus, was not under a disability as defined by the  
21 Social Security Act. (Id.)

---

22  
23 <sup>2</sup> The court notes an internal inconsistency in the ALJ's  
24 decision that should be resolved on remand. In the body of the  
25 decision at Tr. 52, the ALJ found Plaintiff's Barrett's esophagitis  
26 "severe"; in the "Findings" section at Tr. 56, the Barrett's  
27 esophagitis, chronic obstructive pulmonary disease and depression  
28 were found not "severe."

**ISSUES**

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff contends the ALJ erred when he (1) denied Plaintiff's request for additional time to obtain attorney representation; (2) failed to fully develop the record; (3) improperly rejected her treating physician's opinions; (4) improperly rejected Plaintiff's testimony; and (5) posed an incomplete hypothetical to the vocational expert. (Ct. Rec. 17 at 13-15.)

**STANDARD OF REVIEW**

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the court set out the standard of review:

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

**SEQUENTIAL PROCESS**

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the

1 requirements necessary to establish disability:

2 Under the Social Security Act, individuals who are  
 3 "under a disability" are eligible to receive benefits. 42  
 4 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 5 medically determinable physical or mental impairment"  
 6 which prevents one from engaging "in any substantial  
 7 gainful activity" and is expected to result in death or  
 8 last "for a continuous period of not less than 12 months."  
 9 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 10 from "anatomical, physiological, or psychological  
 11 abnormalities which are demonstrable by medically  
 12 acceptable clinical and laboratory diagnostic techniques."  
 13 42 U.S.C. § 423(d)(3). The Act also provides that a  
 14 claimant will be eligible for benefits only if his  
 15 impairments "are of such severity that he is not only  
 16 unable to do his previous work but cannot, considering his  
 17 age, education and work experience, engage in any other  
 18 kind of substantial gainful work which exists in the  
 19 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 20 the definition of disability consists of both medical and  
 21 vocational components.

22 In evaluating whether a claimant suffers from a  
 23 disability, an ALJ must apply a five-step sequential  
 24 inquiry addressing both components of the definition,  
 25 until a question is answered affirmatively or negatively  
 26 in such a way that an ultimate determination can be made.  
 27 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 28 claimant bears the burden of proving that [s]he is  
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)).

## 19 DISCUSSION

### 20 A. Representation by Counsel

21 Plaintiff asserts she was not given proper opportunity to seek  
 22 representation for her hearing. Defendant responds that good cause  
 23 did not exist for additional postponement and the ALJ's refusal to  
 24 do so was appropriate. Defendant further asserts Plaintiff has not  
 25 shown unfairness or prejudice to warrant remand. Plaintiff's  
 26 attorney representative, Kathleen Kilcullen, was appointed June 5,  
 27 2001. (Tr. 97.) She formally notified Plaintiff and the agency of  
 28

1 her withdrawal on March 5, 2002, due to the agency's refusal to  
2 transfer the case to Spokane from Seattle, Washington. (Tr. 99.)  
3 Plaintiff was notified on March 27, 2002, of the ALJ hearing set for  
4 April 15, 2002, in Seattle. (Tr. 107). On April 4, 2002, the ALJ  
5 reset the hearing to May 7, 2002, to allow Plaintiff time to find  
6 local counsel, which she did not accomplish. (Tr. 539.) Plaintiff  
7 requested a second postponement when she appeared at the May 7  
8 hearing, which the ALJ denied. (Id.) Plaintiff asserts that,  
9 contrary to the ALJ's finding that she chose to proceed without  
10 representation, she was denied an opportunity to seek counsel, and  
11 the ALJ's denial is grounds for remand. (Ct. Rec. 17 at 14-15).

12 While representation by counsel is not required in social  
13 security proceedings, an unrepresented claimant is entitled to  
14 "scrupulous and conscientious probing" by the ALJ into all relevant  
15 facts. *Vidal v. Harris*, 637 F.2d 710 (9<sup>th</sup> Cir. 1981). This includes  
16 facts and circumstances that are favorable as well as unfavorable to  
17 claimant. *Cox v. Califano*, 587 F.2d 988, 991 (9<sup>th</sup> Cir. 1978).  
18 Further, where Plaintiff is unrepresented, the ALJ has a heightened  
19 duty to fully develop the record. *Tonapetyan v. Halter*, 242 F.3d  
20 1144, 1150 (9<sup>th</sup> Cir. 2001). To warrant remand due to absence of  
21 counsel, Plaintiff must demonstrate prejudice or unfairness in the  
22 administrative hearings. *Vidal*, 637 F.2d at 713; *Hall v. Secretary*  
23 *of Health, Ed. and Welfare*, 602 F.2d 1372, 1378 (9<sup>th</sup> Cir. 1979). The  
24 issue, therefore is not so much whether remand is necessary because  
25 Plaintiff was denied unduly an opportunity to seek counsel, but  
26 whether the ALJ met his heavy burden of scrupulous examination,  
27 inquiring into all relevant facts, in the absence of counsel.

1 *Vidal*, 637 F.2d at 714 (citing *Cox*, 587 F.2d at 991). For the  
2 reasons discussed below, the court finds that burden was not met.

3 B. Medical Evidence

4 In addition to records considered in ALJ Nichols' October 2000,  
5 decision (Tr. 63-64, 342),<sup>3</sup> the evidence before ALJ Krainess on May  
6 7, 2002, included medical records from treating physician Scott  
7 Shaaf, D.O., covering August 30, 1999 through January 24, 2001, and  
8 a three page Physical Evaluation form from treating physician James  
9 Grabill, M.D., dated June 15, 2001. (Tr. 158-69, 187-90.) Dr.  
10 Shaaf's clinical notes indicate Plaintiff was on muscle relaxant and  
11 anti-inflammatory therapy for her low back pain, and her back  
12 condition was improving with medication and a home exercise program.  
13 (Tr. 159.) He also noted Plaintiff had hurt her shoulder in a fall,  
14 but no further complications were noted due to this injury. (Tr.  
15 160-61.) Dr. Shaaf's records did not include treatment notes for  
16 Plaintiff's plantar fasciitis.

17 Dr. Grabill's evaluation indicates Plaintiff's plantar  
18 fasciitis was causing marked impairment and her back problems  
19 causing moderate impairment in her ability to perform work-related  
20 activities. (Tr. 187.) However, other than a range of motion  
21 chart, there were no clinical notes submitted to explain this  
22 assessment. Although treating physician Grabill did not complete a  
23 formal RFC assessment, in June 2001, he opined that Plaintiff's feet  
24 and back conditions caused significant to very significant

---

25 <sup>3</sup> In those proceedings, ALJ Nichols found Plaintiff not  
26 disabled at any time through the date of his decision September 5,  
27 2000. *See supra*, n.1.  
28

1 interference with her ability to perform one or more basic work-  
2 related activities. (Id.) This opinion is consistent with his  
3 opinions of record in the prior proceedings. (Tr. 498-504.)  
4 Plaintiff asserts Dr. Grabill's opinions were improperly rejected.  
5 (Ct. Rec. 17 at 13.)

6 The record reviewed by ALJ Krainess also includes a Residual  
7 Functional Capacity (RFC) assessment form completed by an agency  
8 adjudicator and affirmed by a non-examining agency physician on  
9 April 4, 2001. The non-examining physician found Plaintiff's  
10 allegations of back and foot problems credible. He determined she  
11 had the ability to stand and walk for two hours in an eight hour  
12 day, sit with normal breaks for six hours in an eight hour day, and  
13 lift 20 pounds occasionally, 10 pounds frequently, with several  
14 postural limitations. (Tr. 174-79.)

15 A prescription form from Barry Tanne, M.D., dated May 6, 2002,  
16 with the written words: "Barrett's esophagitis COPD" also was  
17 included in the record. (Tr. 192.)<sup>4</sup>

18 At the hearing on July 10, 2002, the Plaintiff testified that  
19 her back and foot problems prevented her from walking or standing

---

20  
21 <sup>4</sup> Plaintiff submitted additional medical records after the ALJ  
22 hearing (Tr. 10-24, 37-47), which were considered by the Appeals  
23 Council on review. (Tr. 4A, 5.) Evidence which is reviewed by the  
24 Appeals Council is part of the record for review by district court.  
25 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000). However,  
26 since the case is being remanded for further development of the  
27 record and additional proceedings during which these records will be  
28 reviewed, the court will not discuss these records at this time.



1 longer than one half hour to an hour without a 10 or 15 minute  
2 break. (Tr. 544.) She stated she could sit one half hour to 45  
3 minutes due to her disc disease and arthritis, and could only lift  
4 20 pounds occasionally. (Tr. 544-45.) When the ALJ questioned her  
5 about her other physical ailments, she testified that she had  
6 Barrett's, emphysema and anemia. (545.) She stated her daily  
7 activities were limited to sitting in the sun, reading, some cooking  
8 and household chores. She stated the pain from her feet and back  
9 prevented her from sleeping and made her depressed. (Tr. 546-49.)

10 In his decision, ALJ Krainess stated, "[o]n June 15, 2001,  
11 James R. Grabill, M.D., completed a DSHS physical evaluation.  
12 Although he was basically treating her bilateral foot problems, he  
13 indicated in a range of motion study that the claimant had a limited  
14 range of motion in her back. However, he did not identify any  
15 workplace restrictions." (Tr. 53.) This finding is not supported  
16 by substantial evidence. As discussed above, Dr. Grabill opined  
17 that Plaintiff's impairments significantly interfered with her  
18 ability to work. (See Tr. 187-88.) Where a contradicted treating  
19 physician's medical opinion is not rejected by specific and  
20 legitimate reasons supported by the record, that opinion is credited  
21 "as a matter of law." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir.  
22 1995) (*citations omitted*). Further, the ALJ found that "[n]one of  
23 the claimant's treating physicians rated the claimant's residual  
24 functional capacity." (Tr. 54.) He then based his finding that  
25 Plaintiff can perform sedentary work with postural limitations on  
26 the non-examining physician's opinions in the agency RFC assessment.  
27 (Id.) This is error.

1 The opinion of a non-examining agency physician cannot by  
2 itself constitute substantial evidence that justifies the rejection  
3 of the opinion of either an examining physician or a treating  
4 physician. *Lester*, 81 F.3d at 831 (*citing Pitzer v. Sullivan*, 908  
5 F.2d 502, 506 n.4 (9th Cir. 1990)). Further, as discussed above,  
6 where the claimant is unrepresented, the ALJ has a duty to fully  
7 develop the record. Here, the ALJ found the record incomplete in  
8 that there were no current RFC assessments by treating or examining  
9 physicians. (Tr. 54.) The ALJ's own finding that the record was  
10 inadequate to allow for proper evaluation of the evidence triggers  
11 the duty to develop the record. *Tonapetyan*, 242 F.3d at 1150. The  
12 court also notes that Dr. Schaaf's most recent report is from  
13 January 2001, over one year prior to the hearing. (Tr. 159.) Thus,  
14 the ALJ had a duty to either continue the matter for further  
15 evaluations, keep the record open for supplemental evidence, or  
16 subpoena Dr. Grabill and Dr. Shaaf to testify at the hearing. *Id.*

17 In sum, the ALJ did not meet the heavy burden of scrupulous  
18 inquiry when he proceeded without allowing Plaintiff extra time to  
19 seek counsel. Plaintiff was prejudiced in the proceedings without  
20 counsel to assist her in supplementing the medical record. The  
21 medical record before the ALJ was not adequate to support a finding  
22 of non-disability, and the ALJ's own finding of incompleteness  
23 triggered the duty to more fully develop the record. Further, his  
24 reliance on the non-examining physician's opinion by itself, and his  
25 failure to articulate specific and legitimate reasons for rejecting  
26 Dr. Grabill's opinion are cause for reversal.

1 C. Vocational Expert Testimony

2 Plaintiff contends the ALJ did not include all of her  
3 limitations in his hypothetical; thus, the vocational expert  
4 testimony is not substantial evidence. (Ct. Rec. 17 at 14.)

5 The ALJ presented the following hypothetical:

6 [An individual with] some back and foot problems, perhaps  
7 some others as well, but of course from a vocational  
8 standpoint, the significant thing is what are the  
9 limitations, and I'll ask you to assume that she's capable  
10 of occasionally lifting 20 pounds, frequently ten, and  
11 she's limited in standing and walking to at least two  
12 hours, but not substantially more than two, in an eight  
hour work day, but she can sit for about six hours in a  
eight hour work day. She has some postural limitations  
and these are that she must never be on ladders, ropes or  
scaffolds, and she's occasionally limited in the following  
areas: climbing of ramps or stairs, stooping, crouching  
and crawling.

13 (Tr. 551.)

14 In *Cotton v. Bowen*, 799 F.2d 1403 (9<sup>th</sup> Cir. 1986), the court  
15 established the *Cotton* test in the analysis of subjective symptom  
16 testimony. The *Cotton* test requires the Plaintiff to (1) produce  
17 objective medical evidence of an impairment, and (2) show that the  
18 impairment could reasonably be expected (not that it did in fact) to  
19 produce some degree of symptom."<sup>5</sup> *Cotton*, 799 F.2d at 1407-08. Once  
20 the *Cotton* test is met, the ALJ must evaluate the credibility of the  
21 claimant. If there is no evidence of malingering, the ALJ can  
22 reject the claimant's testimony only with specific, "clear and  
23 convincing" reasons. *Smolen v. Chater*, 80 F. 3d 1273, 1281 (9<sup>th</sup> Cir.

---

24 <sup>5</sup> The ALJ may call a medical expert to review the entire  
25 record and advise whether a claimant's condition would be reasonably  
26 expected to produce alleged symptoms. 20 C.F.R. §§ 404.1529(b),  
27 416.929(b).

1 1996).

2 Here, Plaintiff's severe plantar fasciitis and back problems  
3 could easily produce some degree of pain. An adjudicator "may not  
4 discredit a claimant's testimony of pain and deny disability  
5 benefits solely because the degree of pain alleged by the claimant  
6 is not supported by objective medical evidence." *Bunnell v.*  
7 *Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991)(en banc); 20 C.F.R. §§  
8 404.1529(c)(2), 416.929(c)(2). Although credibility determinations  
9 are the province of the ALJ, *Fair v. Bowen*, 885 F.2d. 597, 604 (9<sup>th</sup>  
10 Cir. 1989), the ALJ must be sufficiently specific to permit the  
11 court to conclude the ALJ did not arbitrarily discredit claimant's  
12 testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir.  
13 2002); *Morgan*, 169 F.3d at 600 (specific reasons for credibility  
14 findings must be articulated and "grounded in the evidence"); see  
15 also *Bunnell*, 947 F.2d at 345-46. If the credibility finding is a  
16 critical factor in the ALJ's decision, it should be as comprehensive  
17 and analytical as feasible, and the finding should be explicit  
18 whether the Secretary believed or disbelieved the claimant. *Lewin*  
19 *v. Schwenker*, 654 F.2d 631, 635 (9<sup>th</sup> Cir. 1981) (quoting *Baerga v.*  
20 *Richardson*, 500 F.2d 309 (3d Cir. 1974), cert denied, 420 U.S.  
21 931(1975). "In addition, the ALJ must specifically identify the  
22 testimony she or he finds not to be credible and must explain what  
23 evidence undermines the testimony." *Holohan v. Massanari*, 246 F.3d  
24 1195, 1208 (9<sup>th</sup> Cir. 2001).

25 Here, Plaintiff's testimony that her back pain limited her  
26 ability to sit for more than 45 minutes contrasts significantly with  
27 the non-examining physician's opinion that she could sit up to six  
28

1 hours. The ALJ found Plaintiff's statements regarding her back and  
2 feet impairments and their impact on her ability to work "not wholly  
3 credible." He reasoned that:

4 The record does not indicate that any of her treating  
5 physicians has recommended the use of a cane. She said  
6 that when her pain is very bad she takes Darvocet. As  
7 noted above, the current records indicate she mostly takes  
8 anti-inflammatory medication or aspirin, which have helped  
9 improve her back pain significantly. Further, she  
10 testified that she lives in a recreational vehicle bus  
11 with her boyfriend. She sits in the sun reading mystery  
12 books, sweeps the floor, and they share the cooking. She  
13 is also able to drive. The claimant has also stated in  
14 the a[sic] daily activities report that she can lift and  
15 carry ten pounds, can occasionally do bending and can  
16 frequently do reaching, handling, and fingering motions.  
17 I find these abilities consistent with sedentary activity.

18 (Tr. 54)(citations to the record omitted.)

19 Although the record includes evidence that might be a basis for  
20 a rejection of Plaintiff's pain allegations, without the assertion  
21 of specific reasons by the fact-finder, the court cannot assume  
22 Plaintiff's lack of credibility. See *Connett v. Barnhart*, 340 F.3d  
23 871, 874 (9<sup>th</sup> Cir. 2003). In his credibility finding, the ALJ did  
24 not specifically address Plaintiff's statements that her pain and  
25 fatigue restrict her ability to sit for more than 45 minutes at a  
26 time. (Tr. 544.) Without proper rejection of Plaintiff's pain and  
27 fatigue testimony, that testimony may be credited as true. See *Lester*,  
28 81 F.3d at 841. If credited as true, limitations caused by pain and  
fatigue should be included in the hypothetical question presented to  
the vocational expert at step five in determining whether a claimant  
is able to perform work in the national economy. Vocational expert  
testimony based on an incomplete hypothetical is not substantial  
evidence on which to find a claimant not disabled. *DeLorme v.*

1 Sullivan, 924 F.2d 841, 850 (9<sup>th</sup> Cir. 1991) (citing *Embrey v. Bowen*,  
2 849 F.2d 418, 423 (9<sup>th</sup> Cir. 1988)).

3 Here, the ALJ presented only one hypothetical to the vocational  
4 expert, which did not include pain or fatigue or other limitations  
5 to the degree alleged by Plaintiff. This was error to the extent  
6 her allegations are credited as true. Where the Plaintiff was  
7 unrepresented, and as the hearing transcript reflects, limited in  
8 her understanding of the proceedings, the ALJ had a duty to explore  
9 all relevant facts in questioning the vocational expert, even those  
10 favorable to the Plaintiff. *Tonapetyan*, 242 F.3d at 1150. Without  
11 counsel to question the vocational expert on behalf of Plaintiff, it  
12 was the ALJ's duty to pose an additional hypothetical with the pain  
13 and fatigue limitations she alleged. The ALJ also should have  
14 asked Plaintiff what, if any, symptoms she suffered as a result of  
15 her Barrett's (which he found to be a severe impairment), COPD and  
16 anemia, in an attempt to elicit information that counsel, if  
17 present, would have wanted presented to the ALJ and the vocational  
18 expert. Without this "scrupulous probing," the proceedings were  
19 prejudicial to Plaintiff within the meaning of the case law. *Vidal*,  
20 637 F.2d at 714-15 (where unrepresented by counsel, claimant was  
21 prejudiced by ALJ's inadequate examination of vocational expert).

22 D. Remedy

23 Plaintiff requests the court to remand for the immediate  
24 payment of benefits. Case law requires an immediate award of  
25 benefits when:

- 26 (1) the ALJ has failed to provide legally sufficient  
27 reasons for rejecting [a medical opinion], (2) there are  
28 no outstanding issues that must be resolved before a  
determination of disability can be made, and (3) it is

1 clear from the record that the ALJ would be required to  
2 find the claimant disabled were such evidence credited.

3 *Harman*, 211 F.3d at 1178 (*citing Smolen*, 80 F.3d at 1292). The  
4 court has some flexibility in determining whether to apply the  
5 "crediting as true" theory to remand for an immediate award of  
6 benefits or for additional administrative proceedings. *Connett*, 340  
7 F.3d at 876. Here, where the record is incomplete, questions remain  
8 regarding the severity of Plaintiff's existing and new impairments  
9 and her RFC.

#### 10 CONCLUSION

11 The court remands the case to the Commissioner for further  
12 development of the record, including updated medical records and RFC  
13 assessments from treating and/or examining physicians, and other  
14 evaluations as deemed necessary. The ALJ will take new vocational  
15 expert testimony and reassess Plaintiff's impairments, credibility,  
16 and RFC in light of the entire record. Plaintiff may retain counsel  
17 and submit additional evidence. Accordingly,

#### 18 IT IS ORDERED:

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is  
20 **GRANTED IN PART**; the cause is **REMANDED** for additional proceedings as  
21 discussed above and pursuant to sentence four of 42 U.S.C. § 405(g).

22 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
23 **Rec. 19**) is **DENIED**.

24 3. Any application for attorney fees shall be made by  
25 separate motion.

26 4. The District Court Executive is directed to file this  
27 Order and provide a copy to counsel for Plaintiff and Defendant.

1 The file shall be **CLOSED** and judgment entered for Plaintiff.

2 DATED July 12, 2006.

3  
4 S/ CYNTHIA IMBROGNO  
5 UNITED STATES MAGISTRATE JUDGE  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28